88-1389

No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

—o—

SHERMAN WAYNE SWEARINGEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

—o—

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QUESTIONS PRESENTED

1. Whether a "draft" or "documentary draft" under Sections 3-104 and 4-104 of the Uniform Commercial Code inherently represents that the nature of the underlying commercial transaction is a "sale," as defined by Section 2-106 of the Uniform Commercial Code.

2. Whether "sales" as defined under Section 2-106 of the Uniform Commercial Code occurred under the facts of this case.

3. Whether lay persons can be presumed without proof to know that a "draft" or "documentary draft" under Sections 3-104 and 4-104 of the Uniform Commercial Code inherently represents that the nature of the underlying commercial transaction is a "sale," as defined by Section 2-106 of the Uniform Commercial Code.

4. Whether lay persons can be presumed without proof to know that "sales" as defined in Section 2-106 of the Uniform Commercial Code were not occurring under the facts of this case.

5. Whether a defendant can be convicted of "bank fraud" under Title 18 United States Code, Section 1344 where there has been no factual showing of the "materiality" of the alleged misrepresentation.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

—o—

Sherman Wayne Swearingen, the "Petitioner" herein, by and through his undersigned counsel, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

—o—

OPINIONS BELOW

The opinion of the court of appeals (App., infra, 36) is reported at 858 F.2d 1555. The opinion of the district court (App., infra, 11) is not reported.

JURISDICTION

The judgment of the court of appeals (App., infra, 31) was entered on November 2, 1988. A petition for rehearing was denied on December 19, 1988 (App., infra, 47). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 18 U.S.C. 371 ("Conspiracy to commit offense or to defraud United States") states, in pertinent part, the following:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined no more than $10,000 or imprisoned not more than five years, or both."

2. 18 U.S.C. 1344 ("Bank fraud") states, in pertinent part, the following:

> "(a) Whoever knowingly executes, or attempts to execute, a scheme or artifice—
>
> "(1) to defraud a federally chartered or insured financial institution; or

"(2) to obtain any of the moneys, funds, credits, assets, securities or other property owned by or under the custody or control of a federally chartered or insured financial institution by means of false or fraudulent pretenses, representations, or promises, shall be fined not more than $10,000, or imprisoned not more than five years, or both."

3. Section 2-106 ("Definitions: . . . "sale" . . . ") of the Uniform Commercial Code and Section 672.106 of the Florida Statutes state, in pertinent part, the following:

"(1) . . . A "sale" consists in the passing of title from the seller to the buyer for a price. . . ."

4. Section 3-104 ("Form of negotiable instruments; "draft;" "check;" . . .") of the Uniform Commercial Code and Section 673.104 of the Florida Statutes state, in pertinent part, the following:

"(2) A writing which complies with the requirements of this section is:

"(a) A "draft" ("bill of exchange") if it is an order;

"(b) A "check" if it is drawn on a bank and payable on demand."

5. Section 4-104 ("Definitions and index of definitions") of the Uniform Commercial Code and Section 674.104 of the Florida Statutes state, in pertinent part, the following:

"(1) In this chapter unless the context otherwise requires

"(f) "Documentary draft" means any negotiable or non-negotiable draft with accompanying documents, securities or other papers to be delivered against honor of the draft;"

STATEMENT

1. In 1984 the Congress created a new statute, Title 18 United Statest Code, Section 1344 (''Bank fraud''). This statute was to complement existing fraud statutes[1] to fight those who would obtain money or credit from the banking system through false or fraudulent pretenses or representations. The elements of this new crime have thus far been defined by the courts as (1) a scheme or artifice to obtain the moneys, funds or credits under the custody or control of a federally insured financial institution; (2) the defendant's participation in the scheme by means of false pretenses, representations, and promises which were material; and (3) that the defendant acted knowingly.[2]

With regard to the second and third elements in the instant case, the indictment alleged that the Petitioner and his alleged co-conspirator, Millian, conspired to violate and did violate this law by submitting ''drafts'' to Landmark Bank ''representing automobile sales from Millian Dollar Auto Sales to Auto Excellence (the Petitioner's business) when, in truth and fact as the defendants there and then well knew, these automobile sales were nonexistent.'' (App., infra, 3) Specifically, on the ''materiality'' of the alleged misrepresentation, the indictment (App., infra, 3) alleged that the alleged false representation of ''sales'' allegedly ''caused'' the bank to give credit for the drafts.

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[1]Title 18 United States Code, Sections 1001, 1014, 1341 and 1343.

[2]*See, United States v. Goldblatt,* 813 F.2d 619, 623 (3rd Cir. 1987) and *United States v. Swearingen,* 858 F.2d 1555, 1556 (11th Cir. 1988).

At trial, the prosecution offered no proof of any *express* representation that the cars described on the face of the drafts were or were not being "sold" as that term is defined under commercial law.[3] Instead, citing the case of *United States v. Bonnette*, 781 F.2d 357, 365 (4th Cir. 1986), the prosecution relied on a legal fiction that, inherent in the use of a "draft"[4], or more particularly, a "documentary draft,"[5] is an irrefutable representation that the transaction underlying the draft is a "sale" (as opposed to a "loan" or "gift," for example). Second, the prosecution offered no proof that the alleged, inherent representation of a "sale" was false, i.e. it offered no proof of any understanding between the Petitioner and Millian that "title" or ownership of the cars described on the drafts would not pass when the drafts passed.[6] Instead, both the prosecution, the District Court and the Court of Appeals glossed over this issue (the issue of whether the alleged, inherent representation of "sales" was, indeed, false) by

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[3]Section 672.106(1) of the Florida Statutes and Section 2-106(1) of the Uniform Commercial Code state, in pertinent part, the following: "A sale" consists in the passing of title from the seller to the buyer for a price."

[4]See, Section 673.104(2) and Section 3-104(2) of the Uniform Commercial Code.

[5]See, Section 674.104(f) of the Florida Statutes and Section 4-104(f) of the Uniform Commercial Code which states, in pertinent part, the following:

> "(f) "Documentary draft" means any negotiable or non-negotiable draft with accompanying documents, securities or other papers to be delivered against honor of the draft."

[6]See, the definition of "sale" under Florida commercial law and under the Uniform Commercial Code. Section 672.106, Florida Statutes and U.C.C. Section 2-106.

focusing in on an issue not raised by the indictment, to-wit: whether the sales were for a "legitimate" purpose.

Third, the prosecution offered no evidence of the third element of "bank fraud," i.e. that the defendant acted "knowingly." The prosecution offered no evidence that the Petitioner knew that, as a matter of law, inherent in the use of a "draft" or "documentary draft" is an irrefutable representation that a "sale" of the vehicle described is occurring. Nor did the prosecution offer any evidence that the Petitioner knew that, under Florida commercial law and under the Uniform Commercial Code, he was not "selling" the cars described.

Fourth and finally, the prosecution offered no evidence at trial that the alleged, irrefutable, inherent representation of sales "caused" the bank to do anything. The prosecution flatly offered *no* evidence that the representation of a "sale" of the vehicle described would have any affect on this or any other bank's decision to give credit for such a draft. To make up for this fourth shortfall in the proof, the courts below held that, as a matter of law, the allegedly false representations of the existence of "sales"were material.[7] They did this without having first

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[7]See, e.g., "These misrepresentations were material . . . Clearly, the fact that the drafts did not represent legitimate sales of automobiles, but were instead paper transactions designed to obtain an interest-free loan, would be of importance to a reasonable banking institution in deciding whether or not to extend immediate credit on the drafts, and false representations of sales are therefore capable of influencing such bank." *United States v. Swearingen*, 858 F.2d 1555, 1558 (11th Cir. 1988).

any factual support as to the "materiality" of the alleged representation and, therefore, contrary to standing law.[8]

In short, the courts did not require the prosecution to offer any factual support for the following elements of the crime alleged in the indictment:

(a) that the Petitioner represented that he was "selling" the cars in question,

(b) that the Petitioner knew he was making such a representation,

(c) that, in fact, there was an understanding between the Petitioner and his alleged co-conspirator that "title" to the vehicles would not pass when the drafts passed, i.e. that no "sales" under commercial law occurred,

(d) that the Petitioner knew that under commercial law he was not "selling" these cars,

(e) that the alleged representation of "sales" of the vehicles involved was "material."

In short, the courts below have made the prosecution's job too easy. They have created legal fictions unsupported by factual evidence in order to satisfy several key elements of the prosecution's burden of proof in this case. This action by the courts below (filling in gaps in the proof by creating legal fictions) has, thereby, created a

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[8]See, e.g., ". . . (T)he district court's finding on the issue of materiality requires an initial factual evidentiary showing by the prosecution, and if the factual showing is insufficient, the defendant is entitled to a directed verdict of acquittal . . ." *United States v. Lueben*, 812 F.2d 179, 185 (5th Cir. 1987).

dangerous precedent which will come back to haunt the system at a later date.

Returning to the specific question of the *inherency* of a representation of a "sale" in the use of a "draft" or "documentary draft," the courts in this case have simply created bad law. The courts below were simply incorrect in saying that "drafts" and "documentary drafts" can *only,* as a matter of law, be used in "sale" transactions (which is, in essence, what they are saying when they say that each time a "draft" is used there is, as a matter of law, an inherent, irrefutable representation that a "sale" is occurring). In light of this "bad law," no longer can "documentary drafts" be used in loan transactions, for example. No longer can finance companies such as GMAC and Ford Motor Credit use "documentary drafts" to draft for certificates of title from dealers in purchase money financing situations. For, if they do, according to the courts below, they run the risk of being indicted for fraud.

There is simply no legal support for saying that such a representation is inherently made in the use of a "documentary draft." The Court in *United States v. Bonnette,* 781 F.2d 357 (4th Cir. 1987) cited no such support. The courts below cited no such support (other than *Bonnette*). There is certainly no support in commercial law for such a legal proposition. There is no case construing Section 4-104(f) of the Uniform Commercial Code in such a way as to state that there is such an inherent representation in the use of a "documentary draft." Instead, what the cases which have considered the term "documentary draft" have stated is that the term means nothing more and nothing less than what is stated in the Code.[9]

Simply put, under the Uniform Commercial Code "documentary drafts," "drafts," "checks," "certificates of deposit," et cetera, are just types of commercial paper. They are no more and no less than vehicles for moving money through the banking and commercial channels of this country. In and of themselves, they represent nothing. *See e.g., Williams v. United States,* 458 U.S. 279, 284-85 (1982). The use of a particular type of commercial paper certainly does not irrefutably, inherently, and as a matter of law represent what the specific nature of the commercial transaction is underlying that paper (e.g. the use of a promissory note no more inherently represents that a "loan" has occurred than that a "sale" has occurred).

The dangers of overzealous courts, such as those below, creating such legal fictions in order to fill in factual gaps in the prosecution's case is that they may be creating "bad law" that will come back to haunt not only the criminal justice system, but also the commercial system as well. Are the use of "documentary drafts" now forever limited to "sale" transactions? Does someone who uses a "documentary draft" in a non-sale context run the risk of being

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[9]*See, e.g.,* "The term "documentary draft" means any negotiable or non-negotiable draft with accompanying documents, securities or other papers to be delivered against the honor of the draft." *Wiley v. Peoples Bank & Trust Company,* 438 F.2d 513, 516 (5th Cir. 1971).

See also, Memphis Aero Corp. v. First American Nat'l Bank, 647 S.W.2d 219, 223 (Tenn. 1983) (". . . the instrument involved here was a "documentary draft" as defined in the U.C.C. It was described by some witnesses as an "envelope draft" . . .")

indicted for mail fraud or bank fraud? In light of *United States v. Swearingen*, 858 F.2d 1555 (11th Cir. 1988), one would have to say "yes."

In the instant case, the lower courts have leaned too far. They have helped the prosecution too much. They have not required the prosecution to prove what it alleged in the indictment. They have not required the prosecution to prove an actual "representation." Instead, they have created a legal fiction without foundation in commercial law. This legal fiction will assuredly come back to haunt the system, either again in a criminal context or, more likely, in a commercial context.

2. As with the first question so also with the second question, the courts below have leaned too far. In their zeal to fill in the gaps in the prosecution's case, they have ignored (because it cannot be addressed and still convict the Petitioner of the crime alleged in the indictment) the question of whether or not the alleged representation that "sales" were occurring was false. The indictment alleges that the Petitioner and his alleged co-conspirator submitted drafts "representing automobile sales from Millian Dollar Auto Sales to Auto Excellence (the Petitioner's company) and from Auto Excellence to Millian Dollar Auto Sales when, in truth and fact as the defendants there and then well knew, these automobile sales were nonexistent." (App., infra, 3).

The indictment, therefore, alleges that no "sales" of the automobiles described on the drafts occurred. Hence, any representation of "sales" inherently made by the drafts would be false. The issue as framed by the indictment was not whether the sales were "legitimate" or not

or whether the parties' primary purpose in the sales was to sell cars or avail themselves of the interest-free opportunity created by their bank. No, the issue as framed by the indictment was simply whether or not "sales" existed.

As for that issue, the legal parameters for determining whether or not "sales" occurred are clearly set forth in the Uniform Commercial Code under Article Two of that Code ("Sales"). Under Section 2-106 of the Uniform Commercial Code and Section 672.106 of the Florida Statutes a "sale" is defined as follows:

> "A "sale" consists in the passing of title from the seller to the buyer for a price."

Simply put, therefore, if ownership passes for a price, a "sale" has occurred under the U.C.C. and under Florida law. There is no requirement that physical possession of the items "sold" must occur in order for there to be a "sale." *Orange Belt Land Exchange, Inc. v. Speer,* 100 Fla. 182, 129 So. 779 (1930). Nor must a change of ownership be reflected on public records before a "sale" can occur. *Correira v. Orlando Bank & Trust Company,* 235 So.2d 20, 24 (Fla. 4th DCA 1970) (this case draws the distinction between transactions involving the transfer of "marketable title" and the transfer of "legal title" or bare ownership).

The only testimony on this issue of whether it was agreed between the parties (the Petitioner and his alleged co-conspirator) that "title" (i.e. ownership) to the vehicles would pass when the drafts passed was that of the Petitioner and Millian (who was testifying pursuant to an agreement with the Government). Both testified that it was the understanding between them that, when a draft

was issued for a car, legal "title" (i.e. ownership) to that car passed for the amount of the draft, regardless of the car's physical location.[10]

> "Q. Now, I am going to pose an example to you. Assume one of the cars that Mr. Swearingen drafts for and gets a (certificate of) title, you give him the (certificate of) title, the Bank gives you instantaneous (sic) credit. Correct?
>
> "A. (Millian) Yes.
>
> "Q. Car is still on your lot. Allright (sic). Somebody comes in and steals that car. Who's car is it?
>
> "A. Wayne's (Petitioner's) car. The other parties (sic) car.
>
> "Q. So when he got the (certificate of) title, even though there was no reassignment, as far as you were concerned he had that car?
>
> "A. He owned the car.
>
> "Q. And would that be true, the same sequence that I just gave you, you draft for a (certificate of) title for (sic) Mr. Swearingen, you get the (certificate of) title, okay, and he keeps the car, he still got it on his lot, car is stolen. Who owns the car?
>
> "A. I would own the car."[11]

In short, the only testimony about the understanding between the Petitioner and his alleged co-conspirator, Millian, was to the effect that, if a draft describing a car passed from one of them to the other, "title" (i.e. owner-

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[10]See, Page 121 of Volume 5 of the record, as well as page 96 of Volume 10 of the record.

[11]See, Volume 5 of the record, page 121. This testimony mirrors that of the Petitioner at Volume 10 of the record, page 96.

ship) to that car also passed. Hence, under Section 2-106 of the Uniform Commercial Code and Section 672.106 of the Florida Statutes, "sales" of these cars did exist (contrary to the allegations of the indictment). Since such "sales" existed, the essential element of the prosecution's case as to the alleged falsity of the alleged representation was without evidentiary support.[12]

However, once again, an overzealous court stepped in to the rescue of a prosecution who had not (given the above testimony) proven what it alleged in the indictment regarding the existence or non-existence of "sales." Without ever trying to decide whether or not the indictment was correct (i.e. whether or not under Florida law "sales" were occurring), the court instead focused solely on the never-disputed motivation behind the "sales." The Court

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[12]Corroborating the above, the bank president testified that both Millian and the Petitioner used the term "sale" to describe what they were doing when he first discussed their arrangement with them. *See*, Volume 3, page 33 of the record. Further corroboration is Millian's testimony that the checks which comprised Petitioner's Exhibit 5 represented situations where he had to "buy" a car back from the Petitioner in order to convey it on to a third-party. *See*, Volume 5 of the record, page 107. *See* also, Volume 10 of the record, page 99. Finally, the bank, itself, after having been made fully aware of what Millian and the Petitioner were doing, treated these transactions as sales. In March of 1986 when the bank required the Petitioner and Millian to pay for all the drafts in the indictment, the bank treated all the vehicles drafted for by the Petitioner as having been sold to him. *See*, Volume 10 of the record, page 129.

then stated that "the drafts did not represent legitimate sales of automobiles" and convicted the Petitioner."

> "Clearly, the fact that the drafts did not represent *legitimate sales* of automobiles, but were instead paper transactions designed to obtain an interest-free loan, would be of importance to a reasonable banking institution in deciding whether or not to extend immediate credit on the drafts, . . ." *United States v. Swearingen,* 858 F.2d 1555, 1558 (11th Cir. 1988), (App., infra, 42).

In short, the Petitioner was convicted of a crime other than the one set forth in the indictment. By the above language from the district court's and the court of appeals' opinions, it is obvious that the courts below were not interested in whether or not "sales" occurred. Rather, they were concerned with the "legitimacy" of the purpose behind the "sales."

3. The third question presented in this petition has to do with the third element of the crime of "bank fraud," to-wit: the element that the defendant acted "knowingly."[13] As the district court correctly pointed out, in determining the elements of "bank fraud" under Section 1344 of Title 18, one should look to case law construing other "fraud" statutes, such as Sections 1341, 1343 and

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[13]*See, e.g.,* United States v. Goldblatt, 813 F.2d 619, 623 (3rd Cir. 1987); *United States v. Swearingen,* 858 F.2d 1555, 1556 (11th Cir. 1988).

1014 of Title 18. If one looks at the case law construing those statutes, as well as the case law construing Section 1344, one will find numerous cases stating that the prosecution must show that the defendant knew that he was representing something and that he knew that what he was representing was false.[14] In this case, the question which the courts should have addressed was whether the Petitioner knew that, as a matter of law, inherent in his use of a "documentary draft" was a representation that he was "selling" the car described on the draft. On that question, no evidence was presented showing that the Petitioner had such knowledge.

To convict a man for "knowingly" making a representation implied in law requires that there be some factual showing that he is aware of what the law implies. Here, there was no such showing. There was no evidence that the Petitioner knew he was making any legal representations to the bank when he deposited a draft. Instead, what, in essence, happened here was that the overzealous courts below didn't care whether he committed this crime knowingly or unknowingly. They didn't care if he "knew" or not that he was making a legally implied representation.

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[14]*See, e.g., United States v. Goldblatt,* 813 F.2d 619, 623 (3rd Cir. 1987) (" . . . the essential elements of bank fraud consist of . . . and (3) that the defendant acted knowingly."); *United States v. Bales,* 813 F.2d 1289, 1293 (4th Cir. 1987) ("[2, 3] In order to sustain convictions under 18 U.S.C.A. Sections 1344 and 1014, the trier of fact must find that Bales knowingly made false representations to the banks, . . ."); *United States v. Habel,* 613 F.2d 1321, 1324 (5th Cir. 1980); *United States v. Sawyer,* 799 F.2d 1494, 1502 (11th Cir. 1986); *see also,* 16 ALR Fed. 825, Section 8 ("Requirement that false statement or report be made knowingly.")

They flat didn't care whether the facts presented by the prosecution proved each element of the crime of "bank fraud." They, instead, implied in law those elements of the crime (e.g. knowledge of a representation implied in law) not proven by the prosecution.

Again, such overzealousness will come back to haunt the system. If this case can be used as precedent to convict persons for making representations implied in law, regardless of any factual showing that the persons have any knowledge of what the law implies, then we're all in trouble.

4. The fourth question presented by this petition is similar to the third in that it deals with the essential element of "knowledge" in the crime of "bank fraud."[15] Did the Petitioner know the falsity of what he was, as a matter of law, impliedly representing? Did he know that, under Florida commercial law, the transactions between Millian and himself did not constitute "sales?"[16] If he did, there was no evidence of it presented at trial.

Again, the case law construing Section 1344 of Title 18, as well as the case law construing other fraud statutes, require that the defendant act "knowingly." Those cases require that he "know" that what he is allegedly representing be false or at least that he know that he has no basis to make such a statement. In the instant case, where the representation is implied, not expressed, where it is a representation implied at law, and where there is no

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[15]See, cases cited in footnote 14, supra.

[16]See, the definition of "sale" in Section 672.106 of the Florida Statutes, to-wit: "A "sale" consists in the passing of title from the seller to the buyer for a price."

evidence that the defendant either knew of the implication or what the law implies, it is impossible to say that the Petitioner acted knowingly. It is, moreover, impossible to say that he knowingly made false representations of "sales" to the bank unless there is some showing that at the time of his actions he understood what constituted a "sale" under Florida commercial law. Without such evidence, the Petitioner should not have been convicted. The courts below simply should not have, without any proof, implied in law that the Petitioner knew that he was making a representation implied in law, and then gone on to imply in law that the Petitioner knew that the implied in law representation was false.

Once again, if this case can be used as precedent to convict a person of fraud where there is no proof that he knows he is making a representation nor any proof that he knows that his unknown representation is false, we are all in deep trouble.

5. As for the fifth question presented by this petition, although the issue of "materiality" is a question of law, not of fact,[17] there is, however, a factual component to the determination of whether or not a particular representation is "material." Case law requires the prosecution to make a reasonable, factual showing of the potential effect of the statement before the court can rule that, as a matter of law, the statement is "material."[18]

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[17]*See, United States v. Beer,* 518 F.2d 168 (5th Cir. 1975).

[18]*See, e.g.,* "[3] In weighing the materiality of a false statement which may make the declarant liable . . ., we are constrained to require a reasonable showing of the potential ef-

(Continued on following page)

In the instant case, therefore, the burden was on the prosecution to make some sort of factual showing of the potential effect of the existence or non-existence of "sales" on a bank's decision to give or not give immediate credit for drafts such as these.

The prosecution's effort to meet that burden was not only insufficient, it was non-existent. The prosecution made no attempt to prove what it alleged in its indictment, i.e. that the alleged misrepresentation of "sales" somehow caused the bank to give credit for the drafts. Further the prosecution made no effort to show that the bank even perceived that the drafts represented that "sales" were occurring. It never called the people who dealt with the drafts and made the actual decisions to give credit for those drafts.[19] It made no effort to show that the perception of the existence or non-existence of "sales" was or would be a factor in those persons' (the collections clerks) decision-making process to give or not give credit for drafts. It made no effort to show what instructions the collections clerks were given as to factors to be con-

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(Continued from previous page)

fects of the statement." *United States v. Beer*, 518 F.2d 168, 172 (5th Cir. 1975).

". . . (T)he district court's finding on the issue of materiality requires an initial factual evidentiary showing by the prosecution, and if the factual showing is insufficient, the defendant is entitled to a directed verdict of acquittal . . ." *United States v. Lueben*, 812 F.2d 179, 185 (5th Cir. 1987).

"Materiality rests upon a factual showing by the prosecution." *United States v. Lichtenstein*, 610 F.2d 1272, 1278 (5th Cir. 1980).

[19]The collections clerks, Anna Mae Eastman and Karen Weaver. *See*, Volume 3 of the record, page 46.

sidered when granting credit for a draft. Although it called the collections clerks' supervisor (Lois Hudnell), the prosecution asked her no questions about what the collections clerks were instructed to consider in granting credit. The only other witness called by the prosecution who worked at the bank during the time frame when the drafts were deposited (Kevin Hale) testified that he had no idea what factors the collections clerks were instructed to consider in granting credit for a draft.[20]. He did testify in corroboration with another former bank employee, Mike Terry, that there was no bank policy or practice to give credit only for those drafts which were part of a "sales" transaction.[21] To the contrary of showing that this alleged representation was "material" to the bank, Mr. Terry testified that the existence or non-existence of "sales" meant nothing to the bank in terms of whether or not a particular draft got credit. Both he and Mr. Hale testified that the bank's only concern was whether the amount of the draft took the automobile dealer over his credit limit with the bank.[22] Moreover, there was no evidence that anyone from the bank ever told the Petitioner or his alleged co-conspirator that credit would only be given for those drafts which were part of "sale" transactions. Finally, the prosecution called no expert witness or other witness to testify as to the "materiality" of the representation of "sales" in any other bank's determination to give credit for a draft.

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[20]See, Volume 3, page 46 of the record.

[21]See, Volume 3, page 103 and Volume 10, page 10 of the record.

[22]See, Volume 3, page 103 and Volume 10, page 10 of the record.

Despite, therefore, there being no factual predicate for stating that the alleged representation of "sales" was material in this or any other bank's determination to grant credit for drafts, the district court (and the court of appeals through its adoption of the reasoning of the district court) took unrequested judicial notice of this allegedly inherent representation's "materiality" and held that such a representation would have been important to a "reasonable banking institution." *United States v. Swearingen*, 858 F.2d 1555 (11th Cir. 1988), (App., infra, 28).

Once again, the courts below in this case leaned too far to the side of the prosecution by overlooking a completely absent factual showing of the "materiality" of the alleged representation. The courts, themselves, did the prosecution's job. Without any factual basis the courts filled in this blank spot in the prosecution's case by taking unsolicited judicial notice of what they felt would be material to a "reasonable banking institution." This is clearly contrary to prior case law which puts this factual burden on the prosecution. Again, if this case can be used as precedent to say that the courts are free to roam the countryside unfettered by proof to determine what "reasonable" people or organizations do or think and to fill in the blank spots in the prosecution's case accordingly, then we are all in deep trouble.

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REASONS FOR GRANTING THE PETITION

This case represents a situation where overzealous courts have in their zeal gone too far and, consequently, made "bad law." In their zeal to convict the Petitioner of a crime not charged in the indictment (i.e. to convict him of failing to disclose to the bank the allegedly "illegitimate," primary purpose of why he was doing what he was doing), the courts have twisted the Uniform Commercial Code definitions of "draft" and "documentary" to legally imply things which are not true (e.g. to imply that such drafts can only be used in "sale" contexts) and to, henceforth, limit the use of "drafts" and "documentary drafts" to "sales" transactions only (lest one run the risk of being indicted for fraud). Thus far, by legal implication rather than by proof, they have held that the Petitioner knew he was making the allegedly implied representation of "sales." Not only have the courts legally implied the Petitioner's knowledge that he was making a representation implied in law, but also by legal implication (rather than by proof) they have found that the Petitioner knew that the allegedly implied in law representation of the existence of "sales" was false.

In short, this is a case where the courts' zeal to convict (fueled by their repugnance at the alleged "illegitimacy" of the defendant's motives in depositing the drafts) have resulted in a man being convicted of a crime other than what he was indicted for and other than what he prepared himself to defend at trial. He has been convicted of fraud without proof of a representation, proof of the falsity of that representation, or proof of his knowledge of either. He has been convicted despite no showing that the

alleged representation could or would have affected how this or any other bank did business. In short, he has been convicted not by proof, but rather by the piling up of unsupported legal implications on top of other unsupported legal implications.

For him this is a personal tragedy. It is an embittering example of a system failed.

For the system, the tragedy is yet to come. If this case can be used as a precedent to twist and limit how one of the major forms of commercial paper can be used, it's impact will be felt well beyond the criminal justice system. If it can be used as precedent for the proposition that persons may be convicted of bank fraud (or other types of fraud) despite no proof of materiality, no proof of knowledge that one is even making a representation, and no proof of knowledge that the representation is false, then the tragedy that is *United States v. Swearingen,* 858 F.2d 1555 (11th Cir. 1988) will be felt by many more people than the Petitioner.

To avoid the future impact of the "bad law" that is this case as it presently stands, as well as to rectify a terrible miscarriage of justice, Petitioner prays this court to grant certiorari herein.

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CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA	No. 87-105-CR-ORL
v.	[18 USC § 371; 5 yrs. and/or $10,000]
SHERMAN WAYNE SWEARINGEN	[18 USC § 1344; 5 yrs. and/or $10,000]
ALTON A. MILLIAN	

The Grand Jury charges:

COUNT ONE

1. From on or about January 24, 1986, through on or about March 3, 1986 in Brevard County, Florida, in the Middle District of Florida,

SHERMAN WAYNE SWEARINGEN
and
ALTON A. MILLIAN

did unlawfully, willfully, and unknowingly conspire, combine, confederate, and agree together and with persons both known and unknown to the Grand Jury to knowingly execute and attempt to execute a scheme and artifice to obtain moneys, funds, and credits under the custody and control of a federally insured financial institution by means of false and fraudulent pretenses and representations, to wit: Citizens and Southern National Bank of Florida, Melbourne, Florida, formerly Landmark Bank of Brevard, the deposits of which were then insured by the Federal Deposit Insurance Corporation, in violation of Title 18, United States Code, Section 1344.

2. At all times material herein:

(a) Auto Excellence was located at 1700 South Harbor City Boulevard, Melbourne, Florida.

(b) Sherman Wayne Swearingen was a co-owner and president of Auto Excellence.

(c) Millian Dollar Auto Sales was located at 1233 North Harbour City Boulevard, Melbourne, Florida.

(d) Alton A. Millian was the president of Millian Dollar Auto Sales.

(e) Landmark Bank of Brevard was acquired by merger in August of 1985 by the Citizens and Southern National Bank of Florida at that time known as Citizens and Southern State Bank of Florida. On April 28, 1986, the name Landmark Bank of Brevard was changed to Citizens and Southern National Bank of Florida. The Landmark Bank of Brevard, the Citizens and Southern National Bank of Florida, and the Citizens and Southern State Bank of Florida were insured by the Federal Deposit Insurance Corporation. For purposes of this indictment, the Landmark Bank of Brevard and its successor banks will be referred to as Citizens and Southern National Bank of Florida.

(f) Auto Excellence and Millian Dollar Auto Sales maintained accounts at Citizens and Southern National Bank of Florida.

(g) Citizens and Southern National Bank of Florida gave Auto Excellence and Millian Dollar Auto Sales immediate credit for "envelope drafts" payable to those businesses.

(h) An "envelope draft" is an order by an automobile purchaser directing that a banking institution pay to, or credit the account of, the seller of an automobile the purchase price of the automobile, and such "envelope draft" is to contain a marketable title for the automobile.

Manner and Means of Conspiracy

The manner and means by which the conspiracy was to be accomplished included, among others:

3. Beginning at a time uncertain, but before January 24, 1986, defendants SHERMAN WAYNE SWEARINGEN and ALTON A. MILLIAN, had devised a scheme and artifice to obtain moneys, funds, and credits under the custody and control of the Citizens and Southern National Bank of Florida by causing to be submitted to Citizens and Southern National Bank of Florida false and fraudulent "envelope drafts" representing automobile sales from Millian Dollar Auto Sales to Auto Excellence and from Auto Excellence to Millian Dollar Auto Sales when, in truth and fact as the defendants there and then well knew, these automobile sales were nonexistent.

4. In the course of furthering the conspiracy, defendants SHERMAN WAYNE SWEARINGEN and ALTON A. MILLIAN caused the Citizens and Southern National Bank of Florida to credit immediately to the Auto Excellence and Millian Dollar Auto Sales accounts at Citizens and Southern National Bank of Florida an approximate total $377,000 for the above-mentioned "envelope drafts" for nonexistent automobile sales between Millian Dollar Auto Sales and Auto Excellence.

5. As a result of the aforesaid conspiracy, the defendant SHERMAN WAYNE SWEARINGEN obtained the beneficial use of approximately $295,650 to which he was not lawfully entitled and the defendant Alton A. Millian obtained the beneficial use of approximately $81,350 to which he was not lawfully entitled.

6. As a result of the conspiracy, the Citizens and Southern National Bank of Florida suffered a loss of approximately $377,000.

OVERT ACTS

7. In furtherance of the conspiracy and to effect the objects thereof, the following overt acts were committed in Brevard County, Florida.

(a) The allegations of executing and attempting to execute a scheme and artifice to obtain moneys, funds, and credits under the custody and control of the Citizens and Southern National Bank of Florida, a federally insured financial institution, by means of false and fraudulent pretenses and representations as set forth in Counts 2 through 27 of this indictment are incorporated herein in the entirety as overt acts in furtherance of the conspiracy.

(b) The allegations of executing and attempting to execute a scheme and artifice to obtain moneys, funds, and credits under the custody and control of the Citizens and Southern Bank [sic] National Bank of Florida, a federally insured financial institution, by means of false and fraudulent pretenses and representations as set forth in Counts 28 through 35 of this indictment are incorporated herein in the entirety as overt acts in furtherance of the conspiracy.

All in violation of Title 18, United States Code, Section 371.

COUNTS TWO THROUGH TWENTY-SEVEN

From on or about January 24, 1986 through March 3, 1986, in Brevard County, Florida, in the Middle District of Florida,

SHERMAN WAYNE SWEARINGEN
and
ALTON A. MILLIAN

defendants herein, knowingly and willfully executed and attempted to execute a scheme and artifice to obtain moneys, funds, and credits under the custody and control of the Citizens and Southern National Bank of Florida, formerly known as the Landmark Bank of Brevard until April 28, 1986, the deposits of which were then insured by the Federal Deposit Insurance Corporation, by means of false and fraudulent pretenses and representations; said scheme and artifice being in essence that set forth in paragraphs two through six of Count One of this indictment, which allegations are incorporated by reference herein; and in the course of executing and attempting to execute said scheme and artifice defendants SHERMAN WAYNE SWEARINGEN and ALTON A. MILLIAN did cause the Citizens and Southern National Bank of Florida to credit to the account of Auto Excellence on or about the date, for the automobile allegedly sold by Auto Excellence to Millian Dollar Auto Sales, and in the approximate amount set forth for each count in the table below:

COUNT	DATE	VEHICLE	AMOUNT
2	1/24/86	1983 Nissan Pulsar, having vehicle identification number JN1MN24S1DM116917	$ 9,000

COUNT	DATE	VEHICLE	AMOUNT
3	2/ 6/86	1982 Chrysler New Yorker having vehicle identification number 3BF66K4CR159525	$ 8,400
4	2/ 6/86	1983 Pontiac Firebird, having vehicle identification number 2AS8719DL203411	$ 6,500
5	2/ 6/86	1983 Chevrolet Camaro, having vehicle identification number 1G1AP87H4DN135218	$ 8,000
6	2/12/86	1982 Datsun Sentra, having vehicle identification number 1HT14S3CT002102	$ 8,000
7	2/13/86	1979 BMW, having vehicle identification number 6818805	$10,000
8	2/13/86	1982 Buick, having vehicle identification number 4AZ5749CE417393	$ 7,500
9	2/14/86	1984 Audi, having vehicle identification number WAUFB0441EN130992	$11,000
10	2/14/86	1981 Lincoln, having vehicle identification number NBP93F5BY616043	$ 9,800
11	2/14/86	1984 Chevrolet Corvette, having vehicle identification number 1G1AY0787E5103377	$13,000
12	2/14/86	1984 Ford, having vehicle identification number 1FMEU15F1ELA24211	$10,000
13	2/14/86	1984 Honda, having vehicle identification number JHMAD5335EC001872	$ 8,500

COUNT	DATE	VEHICLE	AMOUNT
14	2/24/86	1984 Honda, having vehicle identification number JHMAD5335EC001872	$ 9,600
15	2/24/86	1981 Porsche, having vehicle identification number WPOJA0920CS822201	$21,000
16	2/24/86	1985 Chevrolet Van, having vhicle identification number 1GBEG25H5F7197781	$15,500
17	2/25/86	1985 GMC Van, having vehicle identification number 1GTDG15HOF7502606	$13,500
18	2/25/86	1983 Isuzu, having vehicle identification number JABAR07A8DO907161	$ 8,750
19	2/25/86	1984 Mazerati, having vehicle identification number ZAMAL1102EB318094	$15,000
20	2/25/86	1985 Toyota, having vehicle identification number JT2AE82L9F3138339	$ 7,500
21	2/25/86	1984 BMW, having vehicle identification number WBAAK7400E8417819	$14,000
22	3/ 3/86	1981 BMW, having vehicle identification number AAG3301B8020952	$ 9,500
23	3/ 3/86	1985 GMC Van, vehicle identification number 1GTDG15H6F7510242	$11,800
24	3/ 3/86	1981 Chevrolet Corvette, having vehicle identification number 1G1AY876XB5104421	$10,500

COUNT	DATE	VEHICLE	AMOUNT
25	3/ 3/86	1983 Buick, having vehicle identification number 1G4AZ67Y7DE417662	$15,000
26	between 1/24/86 and 3/ 3/86	1985 Chevrolet, having vehicle identification number 1GBEG25H7F7202916	$15,500
27	between 1/24/86 and 3/ 3/86	1983 Nissan marked on envelope and containing title for 1982 Chevrolet Camaro Z-28, having vehicle identification number 1G1AP877XCL158438	$ 9,000

All in violation of Title 18, United States Code, Sections 1344 and 2.

COUNTS TWENTY-EIGHT THROUGH THIRTY-FIVE

From on or about January 24, 1986 through March 3, 1986, in Brevard County, Florida, in the Middle District of Florida,

SHERMAN WAYNE SWEARINGEN
and
ALTON A. MILLIAN

defendants herein, knowingly and willfully executed and attempted to execute a scheme and artifice to obtain moneys, funds, and credits under the custody and control of the Citizens and Southern National Bank of Florida, formerly known as the Landmark Bank of Brevard until April 28, 1986, the deposits of which were then insured by the Federal Deposit Insurance Corporation, by means of false and fraudulent pretenses and representations; said scheme and artifice being in essence that set forth in paragraphs two through six of Count One of this indictment,

which allegations are incorporated by reference herein; and in the course of executing and attempting to execute said scheme and artifice defendants SHERMAN WAYNE SWEARINGEN and ALTON A. MILLIAN did cause the Citizens and Southern National Bank of Florida to credit to the account of Millian Dollar Auto Sales on or about the date, for the automobile allegedly sold by Millian Dollar Auto Sales to Auto Excellence, and in the approximate amount set forth for each count in the table below:

COUNT	DATE	VEHICLE	AMOUNT
28	2/17/85	1985 Mercury, having vehicle identification number 2MEBP75X9FB603165	$ 5,850
29	2/24/86	1986 Ford Van marked on envelope and containing a title for a 1986 Chevrolet van having vehicle identification number 2GBEG25H7G4108144	$16,500
30	2/24/86	1983 Porsche 944, having vehicle identification number WPCAA0949DN454022	$15,000
31	2/24/86	1982 Pontiac Trans Am having vehicle identification number 2AW87H7CL575555	$ 5,200
32	2/26/86	1984 Chevrolet Camaro Z-28, having vehicle identification number 1G1AP87G4EL191485	$10,500
33	2/27/86	1984 Dodge Custom Van, vehicle identification number 2B4HB21T7EK238254	$10,000
34	2/28/86	1983 Honda Prelude marked on the envelope and containing a title for a Honda motorcycle JH2RC1107DM009061	$ 9,500

COUNT	DATE	VEHICLE	AMOUNT
35	2/28/86	1982 Buick Riviera, having vehicle identification number 4AY5735CE424853	$ 8,800

All in violation of Title 18, United States Code, Sections 1344 and 2.

A TRUE BILL

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Foreman

ROBERT W. MERKLE
United States Attorney

By _____
Paul J. Moriarty
Assistant United States Attorney

_____
Walter J. Postula
Managing Assitant U.S. Attorney

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO. 87-105-CR-ORL-19

(Filed January 15, 1988)

UNITED STATES OF AMERICA,

Plaintiff,

v.

SHERMAN WAYNE SWEARINGEN,

Defendant.

ORDER

This case came before the Court as trier of fact on Waiver of Defendant of a trial by jury.

Defendant, Sherman Wayne Swearingen, is charged with one Count of conspiring to obtain monies, funds and credits of a federally insured bank by means of false and fraudulent pretenses and representations in violation of Title 18 U.S.C. § 371. In Counts Two through Thirty-five of the Indictment, Defendant is charged with knowingly and willfully executing and attempting to execute a scheme and artifice to obtain monies, funds and credits under the custody and control of the Citizens and Southern National Bank of Florida, formerly known as the Landmark Bank of Brevard, a federally insured bank, by means of false and fraudulent pretenses and representations in violation of Title 18 U.S.C. §§ 1344 and 2.

The trial of this case began on November 10, 1987. After hearing the testimony, reviewing the exhibits, observing the demeanor of the witnesses, and being apprised

of the law, the Court enters its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

It is a common practice, particularly among those who regularly deal in the purchase and sale of automotive vehicles, to use a document called a draft to effect the sale and transfer of title to a vehicle. The usual practice in the industry is for the purchaser of the vehicle to issue a draft to the seller. The draft is often in the form of an envelope, containing on its face a description and purchase price of the vehicle. At the time the price of the vehicle is agreed upon, the purchaser gives the draft envelope to the seller. The seller then obtains the necessary documents to transfer the title, inserts these documents in the draft envelope, and either presents the draft directly to the buyer for payment or deposits the envelope draft in the seller's bank.[1]

If the envelope draft is deposited in the seller's bank, that bank sends the draft, usually with some deadline for payment, to the bank of the buyer. Within the time allowed by the seller's bank, the buyer would be required to accept the draft or reject it, an event which usually occurs after the buyer examines the documents contained in the draft envelope to make sure that the proper incidents of title have been provided.

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[1]While drafts most commonly contain the title to the vehicle being transferred, a dealer reassignment if the vehicle is being transferred between dealers, and an odometer statement, however, lien satisfactions, powers of attorney, an invoice and other documents may be required by the parties for the purchase and sale in order to pass title to the vehicle.

If the draft is accepted by the buyer, his account at his bank is debited by the amount specified on the face of the draft. If the buyer rejects the draft, the draft envelope is returned to the seller's bank.

The draft represents a promise between the buyer and the seller of the vehicle, usually automobile dealers. If a third entity, a bank, is utilized in the transaction in the manner described above, the bank has the discretion to accept a draft for deposit in the seller's account and to specify the time in which the draft must be paid. The bank also has the discretion to give immediate credit to the seller for a draft upon deposit of the draft prior to the time the draft is accepted or rejected by the purchaser of the vehicle.

Among some dealers in the automobile industry, the concept of "float time" is important. Float time is generally the time between the purchase of the vehicle, when the buyer issues a draft to the seller, and the time when the draft is presented to the buyer for payment. Between these two points in time, "the float", the buyer of the vehicle attempts to resell the vehicle for a profit in order to generate the funds to honor the draft when it is presented for payment.

This case involves the activities of two automobile dealers, Defendant Sherman Wayne Swearingen and his company, Auto Excellence ("AE") and Alton B. Millian and his company, Millian Dollar Auto Sales ("MDAS") and their actions with reference to the Citizens and Southern National Bank of Florida, formerly known as Landmark Bank of Brevard ("the Bank"), a banking institu-

tion located in Melbourne, Florida.[2] Both Swearingen and Millian were automobile dealers with separate accounts at the Bank and, additionally, were on a list of dealers to whom the Bank gave immediate credit upon the deposit of their respective envelope drafts.

According to Millian, Swearingen introduced him to a scheme to get more "float time" by taking advantage of the Bank's grant of immediate credit upon deposit of their envelope drafts. When a draft on a vehicle which had been purchased by Auto Excellence or Millian Dollar Auto Sales was presented by the Bank for payment to either AE or MDAS, and such dealer did not have the funds to cover the draft it had issued, Millian or Swearingen would "float a draft" from the other dealer to his own dealership, deposit it in his car dealership account at the Bank, and thereby generate the funds to pay for the draft being presented through the Bank for payment, usually from a third dealer. While in the typical case drafts between automobile dealers contain the title to the vehicle, a reassignment form and an odometer certification, the drafts in this case, Government's Exhibits 1a through 26a payable to AE from MDAS and Government's Exhibits 27a through 34a payable to MDAS from AE, were never intended to involve the purchase and sale of a vehicle. According to Millian, Government's Exhibits 27a through 34a were drafts used when MDAS bought a car from another dealer and MDAS did not have the funds to pay the draft Millian had issued on behalf of MDAS. Govern-

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[2]It is stipulated that the deposits of the Bank were insured by the Federal Deposit Insurance Corporation.

ment's Exhibits 1a through 26a were drafts used by Swearingen when Swearingen's company, AE, bought a car from another dealer and did not have the funds to pay the draft Swearingen had issued on behalf of AE.

In the event a MDAS draft was presented for payment by the Bank and MDAS did not have the funds to cover the draft, MDAS would cause a draft from AE payable to MDAS to be issued. MDAS would then deposit this draft to its account at the Bank where MDAS received immediate credit on the deposit, thereby generating the funds to enable it to pay for the draft which was being presented for payment from another dealer. Conversely, if a draft from another dealer was presented for AE to pay and AE did not have the funds to cover the draft, AE would cause a draft from MDAS payable to AE to be generated. AE would then deposit this draft in its account at the Bank, taking advantage of the immediate credit allowed by the Bank, and thereby generate the funds to cover the draft which had been presented for payment by another dealer.

Millian testified that he and Swearingen floated more than the thirty-four drafts which were admitted into evidence in this case and that they had engaged in this conduct since 1985. He also testified that he and Defendant Swearingen had floated drafts involving the title to the same cars back and forth between each other, changing the dollar amount appearing on the face of the envelope draft to keep the Bank from detecting their scheme and so that the Bank would think it was a legitimate sale.

Millian testified that he became involved in this scheme because he was over extended on his floor plan of

cars and could not cover his drafts. He stated that floating the drafts was a convenient way for him to generate the funds to pay drafts MDAS had issued and further that he did not have to pay interest on his floor plan loan if he used the immediate credit extended by the Bank on the dealer drafts which he deposited, including those from AE.

Tina Moore worked for Defendant Swearingen at Auto Excellence during 1985 until April 16, 1986. She had been trained by Swearingen to examine the documents of title provided by sellers in the envelope drafts issued by Auto Excellence for the purchase of cars to determine if each draft contained all the necessary documents to effect the sale and transfer of title for the vehicle to AE. She testified that if Swearingen was actually buying a vehicle on behalf of Auto Excellence, the envelope draft would contain at a minimum the title to the car, a dealer reassignment if the purchase was from another dealer, and a mileage statement. She testified that Government's Exhibits 1 through 34 were dealer drafts between AE and MDAS which did not involve a dealer reassignment or a mileage statement because these drafts were never intended to involve the sale of a vehicle. They were to be used as a float.

Ms. Moore described the daily practices at AE. Each morning she would call the Landmark Bank to see what drafts of AE the Bank was presenting for payment. If AE was unable to cover payment for the drafts Swearingen had issued on behalf of Auto Excellence, she would advise Swearingen, usually by telephone, and he would direct her to take a title from the "dummy file", and place

it in a draft issued by MDAS made payable to AE.[3] These drafts were executed in blank by Al Millian on behalf of MDAS. Moore would then fill in the dollar amount which Swearingen directed and a description of the car on the face of the draft. She would insert a title or duplicate title from the "dummy file", and take the MDAS draft made payable to AE to the Bank and deposit it in the AE account, thereby generating sufficient funds for AE to cover and pay the draft which had been issued by AE and was being presented for payment at the Bank.

Ms. Moore testified as to each of the thirty-four drafts in question, stating that each was part of the float scheme devised between Swearingen and Millian. Ms. Moore testified that Swearingen had MDAS drafts executed in blank on hand at the AE offices for purposes of this float. Millian testified that he had drafts executed in blank by AE on hand at the MDAS offices for purposes of this scheme. According to Ms. Moore and Mr. Millian with respect to the drafts between the two car dealers that Ms. Moore actually completed, either Swearingen[4] or Millian directed her how to fill out each draft, what title to place in the draft, and then to take the draft to the Bank for deposit.

Ms. Moore further testified that Mr. Millian was given AE drafts for the express purpose of floating titles from

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[3]According to Ms. Moore, the "dummy file" contained titles for older cars which had not been sold for a period of time and duplicate titles to cars. According to Defendant Swearingen, there was one only file in his office containing all car titles. The term "dummy file" meant those titles in this file for vehicles that he was a dummy for buying because they could not be sold.

[4]Swearingen admitted that he told Moore which car titles to put in the drafts issued by MDAS to AE.

AE to MDAS and for refloating titles back to AE once they had been floated to MDAS.

According to Ms. Moore, Millian and Swearingen floated drafts back and forth between their two companies because when the Bank called for payment of a draft issued by either Swearingen's or Millian's car dealership and that dealership did not have the funds to pay for the draft, Swearingen or Millian used the drafts drawn on each other's companies in order to create the appearance that there were sufficient funds on deposit to pay the draft(s) being presented for payment. She testified that to her knowledge no one at the Bank knew Swearingen or Millian were doing this.

In one instance involving Government's Exhibits 12a and 13a, one draft contained the original and one draft contained the duplicate title to the same car. Ms. Moore testified that she changed the dollar amount on the face of the draft before refloating the draft so that what Auto Excellence and Millian Dollar Auto Sales were doing would not become obvious to the Bank.[5] Since the Bank did not open the draft envelopes, this effort was undertaken by Ms. Moore so that the Bank would not become suspicious.

According to Ms. Moore, the overdraft situation in Auto Excellence's account at the Bank occurred with some frequency. On an equally frequent basis, she would take titles from the "dummy file" at Auto Excellence, put them in a Millian Dollar Auto Sale Draft executed in blank, fill

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[5]According to Al Millian, on Government's Exhibit 12a, a Millian Dollar Auto Sales draft to Auto Excellence, Tina Moore filled in the dollar amount on the face of the draft, and he did not know the price that she filled in.

out a dollar amount on the front of the draft with a description of a car and deposit the draft in Auto Excellence's account at the Bank. At times she went to the Bank, removed titles from a draft presented by the Bank from Millian Dollar Auto Sales to Auto Excellence for payment, reinserted those same documents in another draft which she had made payable from Millian Dollar Auto Sales to Auto Excellence, and deposited such draft in the Bank for credit to the AE account.

From September 1985 until April 1986, the President of the Bank was Kevin Charles Hale. According to Hale, the Bank had no written procedure for the time in which an automobile dealer draft had to be paid or dishonored. The Bank had a list of dealers who were given immediate credit on deposit of drafts from other dealers to their accounts at the Bank. Both Auto Excellence and Millian Dollar Auto Sales had accounts at the Bank while he was its President and were given immediate credit for automobile dealer drafts deposited to their account.

The Bank considered the deposit of a dealer draft a representation that a sale of a vehicle had occurred and that the amount appearing on the face of the draft was the sale price for the vehicle being sold. Hale testified that he was familiar with the Auto Excellence and Millian Dollar Auto Sales accounts at his Bank and that the Bank had given immediate credit, or immediate use of funds represented on the face of the draft,, to the depositor.

On March 6, 1986 it was brought to his attention that Auto Excellence was in an overdraft situation. On examination it was revealed that most of the credits to the Auto Excellence's account were from dealer drafts.

On March 7, 1986 it was brought to his attention that Millian Dollar Auto Sales was in an overdraft situation. On examination it was found that most of the credits to the Millian Dollar Auto Sales' bank account came from the deposit of dealer drafts.

Hale then ordered all outstanding drafts to be assembled and reviewed the drafts deposited to the two accounts over a forty-five to sixty day period. From the face of the drafts this revealed that the same vehicles were being sold back and forth between Auto Excellence and Millian Dollar Auto Sales, a situation which Hale described as a "kite scheme".[6]

On March 7, 1986 Hale met with Al Millian. Hale testified that Millian told him during that meeting that Millian and Swearingen were selling automobiles between each other because automobile sales were slow, and it was difficult to cover his overhead. They used the drafts in question to create business. Hale asked Millian to open the drafts.[7]

On March 9, 1986, Hale met with Defendant Swearingen. Hale had collected the drafts which had been issued by Swearingen's company, Auto Excellence, to Millian's dealership. Swearingen told Hale at that meeting essentially the same thing that Millian had said earlier.

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[6]While Hale testified that up to that time all drafts presented to Auto Excellence and to Millian Dollar Auto Sales for payment had been honored, the two dealers did not have the funds to pay for their drafts then being presented without the use of the "kite."

[7]Hale testified that these drafts issued by Millian Dollar Auto Sales to Auto Excellence approximated the value of $383,000.

that the scheme began because business was slow and that it was used to generate business and cash. Later, Hale had Swearingen return to the bank to open the Auto Excellence drafts.[8]

On Monday, March 10, 1987, Swearingen and his partner made partial payment of the overdraft in Auto Excellence's account and signed notes for the remainder due.[9]

The Bank conducted an audit, attempting to locate the vehicles whose titles had been contained in the drafts which Auto Excellence and Millian Dollar Auto Sales had floated between each other. Upon conclusion of this audit it was determined that several of the vehicles described in the contents of the drafts floated between Auto Excellence and Millian Dollar Auto Sales could not be located and that the value of certain of these vehicles was less than the face amount appearing on the draft containing some of the title documents to that particular vehicle.[10]

Hale testified that Defendant Swearingen did not tell him that the face amount of the drafts would equal the

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[8]The drafts from and to both dealerships and their contents were admitted into evidence as Government's Exhibits 1 through 34.

[9]Swearingen eventually made partial payment of the $116,000 loss sustained by the Bank, leaving a balance claimed of approximately $29,000 which he contests.

[10]It also appeared from the testimony that on occasion the dealer who enclosed title documents in drafts involved in this case had previously sold the vehicle to a third party. Further, some of the drafts invovled descriptions of vehicles on the face of the draft which did not match the vehicle described in the enclosed title document, i.e., Government's Exhibit 33.

amount of the purchase price of a vehicle or that the title contained in the sealed draft envelopes would be a marketable title.[11] Millian testified that he never told the Bank that no sale of a vehicle was occurring through the use of these drafts, although he knew that the Bank did not open the dealer drafts and gave immediate credit for the face amount of the draft.

Both Millian and Swearingen testified that they never intended to cheat the Bank and that at all times they intended to pay the Bank the amount they received as a credit in the bank accounts of their respective automobile dealerships on the deposit of the drafts they were floating between each other. Both Millian and Swearingen testified that, while they had no intent to buy or sell the vehicles whose titles were contained in the drafts, Government's Exhibits 1 through 34, they intended to buy or sell

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[11]While Defendant presented the testimony of Michael Edwin Terry, an officer and employee of the Landmark Bank from July 1977 to January of 1986, such officer left employment at the Bank prior to the time of the deposit of the drafts involved in this case. Further, such witness testified that he had been promised the presidency of the bank, and he left the bank some six months after the merger which caused Mr. Hale to be made President. Mr. Terry testified that the Auto Excellence account was given immediate credit by the Bank on the theory that it was a loan without interest which had as its only limitation that the amount of the loan could not exceed $150,000. Since the use of dealer drafts for the sale of vehicles has been of long-standing and widespread use in the industry, the Court finds Mr. Terry's testimony that the Bank did not require a sale of a vehicle in order to give immediate credit on a dealer draft suspect. In any event, the Court finds that the Bank considered the deposit of the dealer drafts involved in this case a representation that a sale of a vehicle had occurred and a representation that the amount actually appearing on the face of the draft was the amount due from the buyer to the seller for such sale.

the titles to these vehicles to each other and that Government's Exhibits 1 through 34 represented a financial commitment between the two of them as dealers.

While Millian and Swearingen may have intended to pay the Bank sometime in the future when they had funds, the Court finds that both men intended to deceive the Bank in order to obtain the benefit of an immediate credit to their account so that they would be able to meet their financial obligations. This scheme was predicated upon documents which were designed to, and which they knew would in fact, represent to the Bank that a sale of a vehicle had occurred between them for the amount appearing on the face of the draft. In this manner they were able to deceive the Bank into giving them instant credit in order to generate the funds to cover other drafts presented to them for payment through the Bank. The fact that Swearingen and Millian intended to sell titles to cars and not the cars themselves by the documents they included in these dealer drafts is not determinative. In particular, Defendant Swearingen knew that dealer drafts are commonly used in the industry to represent the sale of vehicles, knew that he was given immediate credit on dealer drafts made payable to AE which he deposited at the Bank, and intentionally directed his employee, Tina Moore, to contrive drafts from Millian Dollar Auto Sales made payable to Auto Excellence and to deposit these drafts at times when AE would otherwise be in an overdraft situation in order to generate sufficient credit in the AE account to meet its then extant financial obligations with reference to such bank account. That Swearingen and Millian viewed these drafts as financial commitments to each other belies their artifice which involved obtaining monies from the Bank by a fraudulent scheme.

CONCLUSIONS OF LAW

Based on the above Finding of Facts, the Court finds Defendant Sherman Wayne Swearingen guilty of Count I, conspiring to obtain monies, funds and credits of a federally insured bank by means of false and fraudulent pretenses and representations in violation of Title 18 U.S.C. § 371, and finds Defendant Swearingen quilty of Counts Two through Thirty-five, knowingly and willfully executing and attempting to execute a scheme and artifice to obtain monies, funds and credits under the custody and control of the Citizens and Southern National Bank of Florida, formerly known as the Landmark Bank of Brevard, a federally insured bank, by means of false and fraudulent pretenses and representations, in violation of 18 U.S.C. § 1344 & 2.

As the parties to the case note, there is little case law interpreting the bank fraud statute, 18 U.S.C. § 1344. Accordingly, courts look to the mail and wire fraud statutes, sections 1341 & 1343, and also to another bank fraud statute, section 1014, in interpreting section 1344.

Section 1344 states, in pertinent part, as follows:

> (a) Whoever knowingly executes, or attempts to execute, a scheme or artifice—
>
> (1) to defraud a federally chartered or insured financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities or other property owned by or under the custody or control of a federally chartered or insured financial institution by means of false or fraululent pretenses, representations, or promises, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

The indictment in this case alleges violations of paragraph(a)(2) and not paragraph (a)(1) of this statute. Under this indictment, the Government must prove these elements: (1) a scheme or artifice to obtain the moneys, funds or credits under the custody or control of a federally insured financial institution; (2) the Defendant's participation in the scheme by means of false pretenses, representations, and promises which were material; and (3) that the Defendant acted knowingly. *See United States v. Goldblatt,* 813 F.2d 619, 623 (3rd Cir. 1987). The Government has met its burden.

It is stipulated that the deposits of the Bank were insured by the FDIC. *See supra* n. 2. The concerted conduct of the Defendant and Al Millian was furthermore a scheme or artifice. "Scheme" and "artifice" include any plan or pattern of conduct including false and fraudulent pretenses and representations. *Goldblatt,* 813 F.2d at 624. As is hereafter discussed, the conduct of the Defendant falls within this definition.

The envelope drafts submitted to the Bank by AE and MDAS were false representations, knowingly made with intent to defraud, within the meaning of section 1344.[12]

In *Williams v. United States,* 458 U.S. 279, 284-285 (1982), the Supreme Court held that a "check" is not in

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[12]As noted above, the indictment in this case refers to false and fraudulent pretenses and representations under paragraph (a)(2) of section 1344, instead of a generalized "scheme to defraud" under paragraph (a)(1). Therefore, although the Government has adduced sufficient proof to convict under either theory, as it has proven a "scheme to defraud," *See Goldblatt,* 813 F.2d at 624, the Court adjudges the Defendant guilty only under paragraph (a)(2).

and of itself a "false statement" that sufficient funds exist in the account upon which the check is drawn to cover the check. Accordingly, writing a "bad check" was found not to be a false statement within the meaning of section 1014. In this case, the Defendant argues that under Florida commercial law the envelope drafts at issue similarly made no false representations and that therefore he cannot be convicted under this indictment.

However, the drafts at issue in this case are distinguishable from the checks involved in *Williams,* and are more closely related to the drafts in *United States v. Bonnette,* 663 F.2d 495, 497 (4th Cir. 1981), *cert. denied,* 455 U.S. 951 (1982). In *Bonnette,* the Defendant had been convicted of violating section 1014 by submitting to a bank, in order to obtain immediate credit, sight drafts to which were attached titles representing false sales. The sales were clearly illegitimate. An employee of the defendant testified that the defendant had told her to take titles from cars in inventory and staple them to drafts, and then to make up a price that would represent the "purchase price" for the car. The cars were supposedly sold to two entities which were created by employees of the defendant expressly for the purpose of faking sales. Also, like this case, some of the sales were of cars no longer in the defendant's inventory.

Based on the *Williams* decision, the defendant in *Bonnette* moved to vacate his convictions, arguing that the submitted drafts were not "false statements." The Fourth Circuit denied relief because on the facts of that case, the drafts represented factual assertions. The court said:

> Although checks may not be characterized as factual assertions and therefore cannot be false statements under section 1014, the sight drafts to which titles had been attached did represent assertions: that a car had been sold for the value indicated on the sight draft and, more basically, that a car in fact existed. The title-attached drafts were deposited in the Draft Acceptance Corporation account when, in reality, there had been no sale or there was no car to sell.

United States v. Bonnette, 781 F.2d 357, 365 (4th Cir. 1986). *See also United States v. Worthington,* 822 F.2d 315, 318-319 (2nd Cir. 1987), *cert. denied,* — U.S. —, 108 S.Ct. 331 (1987) (sustaining conviction for false statement under 18 U.S.C. § 1001 where the defendant drew a check on a fictitious bank, since the check was designedly untrue).

In this case, unlike *Bonnette,* the titles to the vehicles were enclosed in envelopes and not stapled to the drafts. However, this distinction is not material. The Court has found that the Defendant knew that the Bank believed that the envelopes drafts represented actual, legitimate sales of vehicles, and that he used that perception to deceive the Bank in order to obtain an immediate credit on non-existent sales. Accordingly, through the envelope drafts involved in this case the Defendant made false factual assertions with the specific intent to defraud the Bank. *See United States v. O'Malley,* 707 F.2d 1240, 1247 (11th Cir. 1983) ("Fraud, for the purposes of a mail fraud conviction, may be proved through the defendant's nonaction or non-disclosure of material facts intended to create a false and fraudulent representation.").

Defendant's claim that actual sales of title, although not marketable title, were occurring is unavailing. Whether or not titles were sold, Defendant intended to

and did deceive the Bank into believing that the drafts represented the commercial sale of vehicles. In fact, the sales were simply "paper" transactions with no purpose other than to obtain interest-free financing from the Bank.

These misrepresentations were material. In this regard, actual reliance by the Bank on the false statements is not determinative. The question is whether the false representations were capable of influencing the Bank's actions. *See United States v. Scott,* 701 F.2d 1340, 1345 (11th Cir. 1983), *cert. denied,* 464 U.S. 856 (1983) (§ 1014 prosecution). *Accord, United States v. Halbert,* 712 F.2d 388, 390 (9th Cir. 1983), *cert. denied,* 465 U.S. 1005 (1984) (mail fraud); *Bonnette,* 663 F.2d at 498. Clearly, the fact that the drafts did not represent legitimate sales of automobiles, but were instead paper transactions designed to obtain an interest-free loan, would be of importance to a reasonable banking[13] institution in deciding whether or not to extend immediate credit on the drafts, and false representations of sales are therefore capable of influencing such bank.[14] The materiality of the misrepresentations is also demonstrated by the Defendant's attempt to conceal his activities from the Bank. In this regard the question of materiality depends to some degree on the fraudulent intent of the Defendant:

> A misrepresentation may be material without inducing any actual reliance. What is important is the

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[13]The Bank's actions upon learning of the scheme underscore the materiality of the misrepresentations to a reasonable bank.

[14]The Court has resolved issues of fact against Mr. Terry's testimony to the contrary.

> intent of the person making the statement that it be in furtherance of some fraudulent purpose.

United States v. Halbert, 640 F.2d 1000, 1009 (9th Cir. 1981) (citations omitted). The misrepresentations involved in this case were intended to deceive the Bank, in the furtherance of fraud. As the Eleventh Circuit has stated regarding arguments that false statements are not material:

> The Supreme Court commented on this type of argument in an early case construing the statute stating: "It does not lie with one knowingly making false statements with intent to mislead . . . to say that the statements were not influential or the information not important." *Kay v. United States,* 303 U.S. 1 (1938).

Scott, 701 F.2d at 1345 (section 1014 case).

Finally, the misrepresentations were made knowingly with intent to defraud. The totality of the evidence in this case, including testimony as to the purpose, manner and means of the scheme, compel the conclusion that the Defendant knowingly attempted to deceive the Bank by submitting false envelope drafts which did not represent actual sales. Defendant's testimony that he intended to pay back the Bank is not sufficient in this case to establish good faith. Instead, the evidence is overwhelming that the Defendant acted in bad faith.

Accordingly, the government has met its burden of proving guilt beyond a reasonable doubt on Counts Two through Thirty-five. On each, the government has shown that the Defendant actually committed or aided and abetted a knowing violation of sections 1344 & 2. All of the false representations made were either ordered by the

Defendant or done with his conscious aid, assistance and counseling.

The Government has also proven a violation 18 U.S.C. § 371. In the present case, it has shown beyond a reasonable doubt that: (1) the Defendant and Mr. Millian came to a mutual understanding to accomplish bank fraud as charged in the indictment, through false and fraudulent pretenses as described above; (2) that the Defendant was a member of that conspiracy; (3) that the Defendant made and aided and abetted false representations as overt acts in furtherance of the conspiracy; and (4) that such false representations were made knowingly in order to defraud the Bank. *See United States v. Horton,* 646 F.2d 181, 186 (5th Cir. 1981), *cert. denied,* 454 U.S. 970 (1981).

Therefore, the Defendant is hereby ADJUDGED GUILTY of one count of conspiracy, 18 U.S.C. § 371, as charged in Count One of the indictment, and thirty-four counts of bank fraud, 18 U.S.C. §§ 1344 & 2, as charged in Counts Two through Thirty-five of the indictment. Sentencing shall be scheduled by separate Order of this Court.

DONE AND ORDERED in Chambers at Orlando, Florida, this 15th day of January, 1988.

/s/ Patricia C. Fawsett
PATRICIA C. FAWSETT
United States District Judge

Copies to:
Frederic B. O'Neal, Esquire
Harrison T. Slaughter, Esquire
Paul J. Moriarty, Assistant United States Attorney

(Offense occurred after 01-01-85)

UNITED STATES DISTRICT COURT
Middle District of Florida

UNITED STATES OF AMERICA

V.

SHERMAN WAYNE SWEARINGEN

577 Spindle Palm Drive
Indialantic, FL 32903

JUDGMENT IN A CRIMINAL CASE

(Filed March 2, 1988)

Case Number: 87-105 Cr-Orl-19

(Name and Address of Defendant)

Harrison T. Slaughter, Jr., Esq. (Retained)
Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:

[☐ guilty ☐ nolo contendere] as to count(s).....,and [XX] not guilty as to count(s) One through Thirty-five of the Indictment.

THERE WAS A:

[XX] finding ☐ verdict] of guilty as to count(s) One through Thirty-five of the Indictment.

THERE WAS A:

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: unlawfully, willfully, and knowingly conspiring, combining, confederating, and agreeing with others to knowingly execute and attempt to execute, and thereafter knowingly and willfully executing and attempting to execute a scheme and artifice to obtain moneys, funds, and credits under the custody and control of the Citizens

and Southern National Bank of Florida, formerly known as the Landmark Bank of Brevard, the deposits of which were then insured by the Federal Deposit Insurance Corporation, by means of false and fraudulent pretenses and representations; in violation of Title 18, United States Code, Sections 1344 and 2.

IT IS THE JUDGMENT OF THIS COURT THAT: on Count One of the Indictment, the defendant shall be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE (1) YEAR, or until otherwise discharged as provided by law.

IT IS ADJUDGED on each of Counts Two through and including Thirty-five of the Indictment, the imposition of a sentence of imprisonment is suspended and the defendant placed on probation with the probation officer of this court for a period of FIVE (5) YEARS, subject to the standing conditions of probation of this court.

IT IS FURTHER ADJUDGED that the sentences imposed with respect to Counts Two through Thirty-five of the Indictment shall run concurrently with each other, and consecutively to the sentence imposed with respect to Count One of the Indictment.

IT IS ADJUDGED that the defendant shall pay a fine in the amount of THREE THOUSAND DOLLARS ($3,000.00), to the United States of America.

(Continued on Page Three)

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on the reverse of this judgment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;

(2) associate only with law-abiding persons and maintain reasonable hours;

(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);

(4) not leave the judicial district without permission of the probation officer;

(5) notify your probation officer immediately of any changes in your place of residence;

(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $1,750.00 pursuant to Title 18, U.S.C. Section 3013 for count(s) One through Thirty-five.

IT IS FURTHER ORDERED THAT counts.....are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitutions, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

☐ The Court orders commitment to the custody of the Attorney General and recommends:

February 29, 1988
Date of Imposition of Sentence

/s/ Patricia C. Fawsett
Signature of Judicial Officer

PATRICIA C. FAWSETT, United States District Judge
Name and Title of Judicial Officer

Date: March 2, 1988

RETURN

I have executed this Judgment as follows:

Defendant delivered on..... to ..... at
Date
....., the institution designated by the

Attorney General, with a certified copy of this Judgment in a Criminal Case.

.....
United States Marshal

By.....
Deputy Marshal

(Continued)

IT IS FURTHER ADJUDGED that the defendant shall make restitution in the amount of THIRTEEN THOUSAND DOLLARS ($13,000.00) to Citizens and Southern National Bank of Florida, Post Office Box 857, Melbourne, Florida.

IT IS ADJUDGED that as special conditions of the probation imposed herein, the defendant shall pay the $3,000.00 fine, the $13,000.00 restitution and the $1,750.00 special assessment at the rate of $1,000.00 each month for eighteen months, beginning with the first month of probation.

IT IS ADJUDGED that the commencement of execution of sentence shall be deferred until 12 o'clock, noon, Friday, March 25, 1988 at which time the defendant shall at his own expense report to the institution designated by the Attorney General for service of sentence.

/s/ Patricia C. Fawsett
PATRICIA C. FAWSETT
United States District Judge

UNITED STATES of America,

Plaintiff-Appellee,

v.

Sherman Wayne SWEARINGEN,

Defendant-Appellant.

No. 88-3178

Non-Argument Calendar.

United States Court of Appeals,
Eleventh Circuit.

Nov. 2, 1988.

Defendant was convicted by the United States District Court for the Middle District of Florida, No. 87-105-CR-ORL-19, Patricia C. Fawsett, J., of one count of conspiracy to commit bank fraud and 34 counts of bank fraud, and he appealed. The Court of Appeals held that convictions were supported by evidence that defendant and fellow automobile dealer drew and presented drafts involving fictitious automobile sales to each other in order to solve their cash flow problems.

Affirmed.

Harrison Slaughter, Jr., Frederic B. O'Neal, Winderweedle, Haines, Ward & Woodman, Orlando, Fla., for defendant-appellant.

R.W. Merkle, U.S. Atty., Paul Moriarty, Asst. U.S. Atty., Orlando, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before TJOFLAT, FAY and KRAVITCH, Circuit Judges.

PER CURIAM:

Following a bench trial in the district court, Sherman Wayne Swearingen was convicted of one count of conspiracy to commit bank fraud and of thirty-four counts of bank fraud, *see* 18 U.S.C. § 371, 1344 (1982 & Supp. IV 1986). Swearingen appeals. His principal claim of error, the only claim worthy of discussion is that the evidence was insufficient to convict. We affirm.

At the time appellant engaged in the conduct that led to his indictment, he was an automobile dealer, trading under the name Auto Excellent. Appellant's business had serious cash flow problems; often, he did not have enough money in his checking account at the Landmark Bank of Brevard (the Landmark or Bank) to pay for the cars he purchased for Auto Excellent's inventory. A friend of appellant's, Alton B. Millian, had the same problem at his automobile dealership, Millian Dollar Auto Sales. Millian also maintained his dealership's checking account at the Landmark. In time, the two men got together and devised a scheme to solve their cash flow problems. As described in the several counts of the indictment, the scheme worked in the following manner.

When appellant needed cash to pay for an automobile he was purchasing from another automobile dealer, he would draw a draft on Millian and present it to the Landmark for collection. (The draft represented to the Bank that Millian had purchased a car from appellant and would pay for the car by honoring the draft.) The Bank would give appellant immediate credit for the draft, by increas-

ing the balance in his checking account in the amount of the draft; appellant would then use these new funds to pay for the automobile he was purchasing. Thereafter, in the ordinary course of business, the Landmark would present the draft to Millian for payment, and he would honor it, instructing the bank to debit his checking account. To generate the funds necessary to pay the draft, Millian would present the bank with a draft that he had drawn on appellant (which represented to the Bank that appellant had purchased a car from him and would pay for the car by honoring the draft). The Bank, in turn, would give Millian immediate credit by increasing the balance in his checking account, and then present the draft to appellant for payment. Appellant would pay the draft with funds in his checking account, which he would have generated by getting immediate credit on another draft he would have drawn on Millian and presented to the Landmark for payment.

The drafts appellant and Millian drew on each other and presented to the Landmark involved fictitious automobile sales. The drafts were in the form of an envelope. On its face, the envelope bore a description and the sales price of the vehicle purportedly sold; inside, the envelope contained the documents necessary to transfer title to the buyer-appellant or Millian. These documents were of course false, in that the parties did not intend them to evidence a genuine transaction.

In rejecting appellant's argument that he, and Millian, were actually selling each other automobile titles (the titles enclosed in the draft envelopes) and thus could not have intended to defraud the Bank, or conspire against it to

commit bank fraud, the district court appropriately noted that there was little case law on point. The court therefore looked to cases involving the mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343 (1982), and another bank fraud statute, 18 U.S.C. § 1014 (1982), for guidance. We repeat the district court's analysis at length because we believe it to be correct.

Section 1344 states, in pertinent part, as follows:

> (a) Whoever knowingly executes, or attempts to execute, a scheme or artifice—
>
> (1) to defraud a federally chartered or insured financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities or other property owned by or under the custody or control of a federally chartered or insured financial institution by means of false or fraudulent pretenses, representations, or promises, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

The indictment in this case alleges violations of paragraph (a)(2) and not paragraph (a)(1) of this statute. . . . the Government [therefore] must prove these elements: (1) a scheme or artifice to obtain the moneys, funds or credits under the custody or control of a federally insured financial institution; (2) the Defendant's participation in the scheme by means of false pretenses, representations, and promises which were material; and (3) that the Defendant acted knowingly. *See United States v. Goldblatt*, 813 F.2d 619, 623 (3rd Cir. 1987). The Government has met its burden.

[The deposits of the Bank were insured by the FDIC. . . . The concerted conduct of the Defendant and . . . Mil-

lian was a scheme or artifice. "Scheme" and "artifice" include any plan or pattern of conduct including false and fraudulent pretenses and representations. *Goldblatt,* 813 F.2d at 624. As is hereafter discussed, the conduct of the Defendant falls within this definition.

The envelope drafts submitted to the Bank . . . were false representations, knowingly made with intent to defraud, within the meaning of section 1344[(a)(2)].

In *Williams v. United States,* 458 U.S. 279, 284-285 [102 S.Ct. 3088, 3091-3092, 73 L.Ed.2d 767] (1982), the Supreme Court held that a "check" is not in and of itself a "false statement" that sufficient funds exist in the account upon which the check is drawn to cover the check. Accordingly, writing a "bad check" was found not to be a false statement within the meaning of [18 U.S.C. §] 1014. In this case, the Defendant argues that under Florida commercial law the envelope drafts at issue similarly made no false representations and that therefore he cannot be convicted under this indictment.

However, the drafts at issue in this case are distinguishable from the checks involved in *Williams,* and are more closely related to the drafts in *United States v. Bonnette,* 663 F.2d 495, 497 (4th Cir. 1981), *cert. denied,* 455 U.S. 951 [102 S.Ct. 1456, 71 L.Ed.2d 666] (1982). In *Bonnette,* the Defendant had been convicted of violating section 1014 by submitting to a bank, in order to obtain immediate credit, sight drafts to which were attached titles representing false sales. The sales were clearly illegitimate. An employee of the defendant testified that the defendant had told her to take titles from cars in inventory and staple them to drafts, and then to make up a price

that would represent the "purchase price" for the car. The cars were supposedly sold to two entities which were created by employees of the defendant expressly for the purpose of faking sales. Also, like this case, some of the sales were of cars no longer in the defendant's inventory.

Based on the *Williams* decision, the defendant in *Bonnette* moved to vacate his convictions, arguing that the submitted drafts were not "false statements." The Fourth Circuit denied relief because on the facts of that case, the drafts represented factual assertions. The court said:

> Although checks may not be characterized as factual assertions and therefore cannot be false statements under section 1014, the sight drafts to which titles had been attached did represent assertions: that a car had been sold for the value indicated on the sight draft and, more basically, that a car in fact existed. The title-attached drafts were deposited in the Draft Acceptance Corporation account when, in reality, there had been no sale or there was no car to sell.

United States v. Bonnette, 781 F.2d 357, 365 (4th Cir.1986). *See also United States v. Worthington,* 822 F.2d 315, 318-319 (2nd Cir.1987), *cert. denied,* — U.S. —, 108 S.Ct. 331 [98 L.Ed.2d 358] (1987) (sustaining conviction for false statement under 18 U.S.C. § 1001 where the defendant drew a check on a fictitious bank, since the check was designedly untrue).

In this case, unlike *Bonnette*, the titles to the vehicles were enclosed in envelopes and not stapled to the drafts. However, this distinction is not material. Th[is] Court has found that the Defendant knew that the Bank believed that the envelopes drafts represented actual, legitimate

sales of vehicles, and that he used that perception to deceive the Bank in order to obtain an immediate credit on non-existent sales. Accordingly, through the envelope drafts involved in this case the Defendant made false factual assertions with the specific intent to defraud the Bank. *See United States v. O'Malley*, 707 F.2d 1240, 1247 (11th Cir.1983) ("Fraud, for the purposes of a mail fraud conviction, may be proved through the defendant's non-action or non-disclosure of material facts intended to create a false and fraudulent representation.").

Defendant's claim that actual sales of title, although not marketable title, were occurring is unavailing. Whether or not titles were sold, Defendant intended to and did deceive the Bank into believing that the drafts represented the commercial sale of vehicles. In fact, the sales were simply "paper" transactions with no purpose other than to obtain interest-free financing from the Bank.

These misrepresentations were material. In this regard, actual reliance by the Bank on the false statements is not determinative. The question is whether the false representations were capable of influencing the Bank's actions. *See United States v. Scott*, 701 F.2d 1340, 1345 (11th Cir.1983), *cert. denied*, 464 U.S. 856 [104 S.Ct. 175, 78 L.Ed.2d 158] (1983) (§ 1014 prosecution). *Accord United States v. Halbert*, 712 F.2d 388, 390 (9th Cir.1983), *cert. denied*, 465 U.S. 1005 [104 S.Ct. 997, 79 L.Ed.2d 230] (1984) (mail fraud); *Bonnett*, 663 F.2d at 498. Clearly, the fact that the drafts did not represent legitimate sales of automobiles, but were instead paper transactions designed to obtain an interest-free loan, would be of importance to a reasonable banking institution in deciding whether

or not to extend immediate credit on the drafts, and false representations of sales are therefore capable of influencing such bank. The materiality of the misrepresentations is also demonstrated by the Defendant's attempt to conceal his activities from the Bank. In this regard, the question of materiality depends to some degree on the fraudulent intent of the Defendant:

> A misrepresentation may be material without inducing any actual reliance. What is important is the intent of the person making the statement that it be in furtherance of some fraudulent purpose.

United States v. Halbert, 640 F.2d 1000, 1009 (9th Cir. 1981) (citations omitted). The misrepresentations involved in this case were intended to deceive the Bank, in the furtherance of Fraud. As the Eleventh Circuit has stated regarding arguments that false statements are not material:

> The Supreme Court commented on this type of argument in an early case construing the statute stating: "It does not lie with one knowingly making false statements with intent to mislead . . . to say that the statements were not influential or the information not important." *Kay v. United States*, 303 U.S. 1[, 6] [58 S.Ct. 468, 471, 82 L.Ed.2d 607] (1938).

Scott, 701 F.2d at 1345 (section 1014 case).

Finally, the misrepresentations were made knowingly with intent to defraud. The totality of the evidence in this case, including testimony as to the purpose, manner and means of the scheme, compel the conclusion that the Defendant knowingly attempted to deceive the Bank by submitting false envelope drafts which did not represent actual sales. Defendant's testimony that he intended to pay

back the Bank is not sufficient in this case to establish good faith. Instead, the evidence is overwhelming that the Defendant acted in bad faith.

(Footnotes omitted.)

The evidence of guilt in this case was compelling. Appellant's convictions are, accordingly,

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-3178
Non-Argument Calendar

D.C. Docket No. 87-105

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SHERMAN WAYNE SWEARINGEN,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

---

Before TJOFLAT, FAY and KRAVITCH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and as taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 34-3;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of

convictions of the said District Court in this cause be and the same are hereby AFFIRMED.

Entered: November 2, 1988

For the Court: Miguel J. Cortez, Clerk

By: Karleen McNabb
Deputy Clerk

ISSUED AS MANDATE: DEC 29 1988

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 88-3178

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SHERMAN WAYNE SWEARINGEN,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

---

ON PETITIONS FOR REHEARING AND SUGGESTIONS OF REHEARING IN BANC

(Filed Dec. 19, 1988)

(Opinion November 2, 1988, 11 Cir., 1988, — F.2d —).

Before TJOFLAT, FAY and KRAVITCH, Circuit Judges.

PER CURIAM:

(√) The Petitions for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested poll of the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Donald Tjoflat
United States Circuit Judge